82-1852

No. ———

Office-Supreme Court, U.S.
FILED
MAY 6 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

HANNELORE ADAMSONS,

Petitioner,

against

AMERICAN AIRLINES,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York

---

ROBERT M. GINSBERG
JOSEPH S. LOBENTHAL, JR.
Attorneys for Petitioner
225 Broadway #3105
New York, NY 10007
(212) 227-4225

May, 1983

Question Presented for Review.

Did the Court of Appeals of the State of New York properly interpret §1111 of the Federal Aviation Act (49 U. S. C. §1511).

Parties and Attorneys Below.

Parties in all courts below were Hannelore Adamsons, plaintiff, and American Airlines, defendant. Hannelore Adamsons' attorney in all proceedings below was Robert M. Ginsberg, Esq., 225 Broadway, New York, New York 10007. American Airlines attorney in all proceedings below was John M. Downing, Esq., 233 Broadway, New York, New York 10007.

Table of Contents.

	Page
Question Presented	i
Parties and Attorneys	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Federal Statute Involved	2
Conflicting Federal Case	2
Facts of the Case	3
History of the Case	3
Reasons for Granting the Writ	4
Conflict between the New York Court of Appeals and the Ninth Circuit Court of Appeals	5
Importance of the issue	7

APPENDIX.

Opinion Below	A1
Cordero v. CIA etc. (District Court)	A10
Cordero v. CIA etc. (Court of Appeals)	A14
Denial of Motion to Reargue	A21

Page

TABLE OF AUTHORITIES.

STATUTES:

49 U. S. C. §1511 (FAA §1111)..... 2, 4, 5

CASES:

Cordero v. CIA Mexicana De Aviacion, Ninth Circuit Court of Appeals, 681 F. 2d 669 (1982) 2, 5, 6

Cordero v. CIA Mexicana De Aviacion, United States District Court, 512 F. Supp. 205 (1981) 2, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982.

No.

HANNELORE ADAMSONS,

Petitioner,

v.

AMERICAN AIRLINES,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of The State of New York.

Hannelore Adamsons petitions that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York which reversed a judgment in her favor in the sum of $500,000 and dismissed her complaint.

Opinion Below.

Reference is made to the official and unofficial report of the New York State Court of Appeals. The unofficial

report is reproduced in the appendix (A1-A9). The official report is at 58 N. Y. 2d 42.

Jurisdiction.

The date of the opinion and decision of the Court below was December 15, 1982.

A motion for reargument was brought January 11, 1983, returnable January 24, 1983; within the time limit prescribed by the New York Statutes. The motion for reargument, etc., was denied on February 10, 1983 (A21).

Federal Statute Involved.

The federal statute involved in the within case, namely 49 U. S. C. §1511, states in its part relevant to this case; "Subject to reasonable rules and regulations prescribed by the administrator, any such carrier may also refuse transportation of a passenger * * * when in the opinion of the carrier such transportation would or might be inimical to safety of flight."

Conflicting Federal Case.

49 U. S. C. §1511 was interpreted in *Cordero v. CIA Mexicana D'Aviancion* by both United States District Court (512 F. Sup. 205) and the Ninth Circuit Court of Appeals (681 F. 2d 669). The District Court interpreted 49 U. S. C. §1511 exactly as did the New York Court of Appeals in this case; whereas the Ninth Circuit reversed the District Court, interpreting 49 U. S. C. §1511 differently from both the District Court and the New York Court of Appeals. Unofficial copies of both opinions are contained in the Appendix (A10-A13, Dist. Ct.; A14-A20, Ct. of Ap.)

Facts of the Case.

Plaintiff, Hannelore Adamsons, was an American citizen working on temporary employment in the country of Haiti. She came down with a mysterious illness that in the course of a few days progressed to paralysis of her lower extremities. She received medical treatment in Haiti, but the doctors there, unable to definitively diagnose her illness, recommended that she go to the United States for further medical diagnosis and treatment. On January 31, 1972, a friend of plaintiff went to the airport in Port-au-Prince, Haiti; spoke with the two individuals in charge of defendant, American Airlines, operations at that airport; fully explained plaintiff's condition and situation, and booked passage for plaintiff to fly to New York City the next day. The next day plaintiff arrived at the airport as scheduled; was wheeled by defendant's employees part way up the gangway of the airplane, but was then refused passage by other of defendant's employees. Plaintiff was required to remain in Haiti for an additional forty-eight hours until different passage could be arranged. Plaintiff is now permanently paralyzed from the waist down and is devoid of certain bowel and bladder functions. Plaintiff's medical expert testified at the trial that the forty-eight hour delay prevented a reversal of a substantial portion of plaintiff's paralysis.

History of the Case.

The Trial Judge in Supreme Court, New York County, submitted the case to the jury on the basic theory that defendant airline was required to use reasonable care in ascertaining whether plaintiff posed a danger to herself or others on the flight, and that the failure of the airline to use reasonable care in this regard would make them liable

for that part of plaintiff's present condition that was reversible had she been promptly brought to New York City for medical treatment. The trial jury found the airline responsible under the foregoing theory, and awarded plaintiff $525,000 in damages, reduced by the Trial Judge to $500,000—the amount of plaintiff's *ad damnum* clause.

An appeal was taken to the Appellate Division of the New York Supreme Court, First Department, which affirmed the judgment, one justice dissenting, holding that there was sufficient evidence to support a verdict against the defendant-airline.

Defendant appealed to the New York State Court of Appeals, which ruled 6-0 that the complaint should be dismissed. The rationale of the New York State Court of Appeals was that Section 1511 did not require the airline to use reasonable care and that the airline's decision would only be actionable if it were "arbitrary, capricious, or irrational," and if the safety issue was used "as a sham."

The interpretation of U.S.C. §1511 was considered in each of the three Courts below.

Reasons for Granting the Writ.

The reasons for requesting allowance of the writ of certiorari in the within case are based on Rules 17B and 17C of the Rules of the United States Supreme Court; in that the New York State Court of Appeals has decided a Federal question, namely the interpretation of 49 U.S.C. §1511 in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit, and that the question involves an important area of Federal Law, which should be settled by this Court, in that the passage on airlines of a considerable number of people will be affected by the decision.

a. The conflict between the New York State Court of Appeals and the Ninth Circuit Court of Appeals.

The issue concerning 49 U.S.C. §1511 is the criteria by which airlines are to be judged in rejecting passengers for passage.

The New York State Court of Appeals has held that the decision of the airline must be accepted "absent a showing of arbitrariness," unless the carrier "uses the safety issue as a sham in order to accomplish another purpose." This determination by the New York State Court of Appeals is directly in conflict with the determination of the Circuit Court of Appeals, for the Ninth Circuit in *Cordero v. CIA Mexicana D'Aviacion, S.A., supra.*

The Circuit Court of Appeals held that the same statute requires "carriers to act reasonably in formulating opinions." That Court approved a charge to the jury which stated that the criteria was such as "would cause a reasonably careful and prudent air carrier of passengers to form the opinion that the presence aboard a plane of the passenger-applicant 'would or might be inimicable to safety of flight.' "

Thus, the conflict between the New York State Court of Appeals and the Circuit Court of Appeals of the Ninth Circuit is whether the above mentioned Federal statute requires the air carrier to use reasonable care in its enforcement, or on the other hand vests in the air carrier almost unlimited discretion to reject passengers subject only to not using the statute as a "sham."

A little more background is perhaps in order.

In the brief filed by the airline in the New York State Court of Appeals, the defendant quoted extensively from the United States District Court opinion in *Cordero, supra.* U.S.D.C., Judge Smith had submitted the case to the jury upon the legal proposition that the airline was responsible if it failed to use reasonable care in determining that the safety of the flight was in danger. However, following the jury verdict in favor of plaintiff, Judge Smith set the verdict aside and ruled that the decision of the airline to evict plaintiff, *Cordero,* need not have been based on the standard of reasonable care.

At the time that the briefs in the within case were presented to the New York State Court of Appeals only the District Court opinion in *Cordero, supra,* had been rendered. Defendant-airlines quoted extensively from the District Court opinion in its brief.

The reversal of the District Court by the Circuit Court of Appeals occurred between filing of the written briefs and oral argument in the within action. At oral argument the New York State Court of Appeals was told of the reversal in the area of compensatory damages. The New York State Court of Appeals in its unofficial opinion, which is part of the appendix, for some reason instead of indicating that the Circuit Court of Appeals of the Ninth Circuit had *reversed* the District Court, indicated that the Ninth Circuit had *affirmed* the District Court.

Plaintiff naturally moved for reargument. The New York State Court of Appeals denied reargument without opinion, but interestingly in the official report of the within action, changed the citation to indicate that the *Cordero* case was affirmed in part and reversed in part. However, the opinion of the New York State Court of Appeals quotes extensively from the very portion of the

District Court opinion that was reversed by the Ninth Circuit.

Thus, not only is there a conflict between the New York State Court of Appeals and the Circuit Court of Appeals of the Ninth Circuit, but in addition the New York State Court of Appeals has failed to address this conflict and has instead adopted the heart of an opinion by a United States District Court concerning the interpretation of a Federal Statute that has been overruled by a Circuit Court of Appeals.

It is therefore respectfully urged not only that the interpretation of the New York State Court of Appeals is incorrect (as will be demonstrated in the brief on appeal), but also that the New York State Court of Appeals did not give proper judicial consideration or courtesy to the Circuit Court of Appeals of the Ninth Circuit, and at least discuss its reason for disagreeing. Citing an overruled opinion, without even indicating that it has been overruled, does not, it is respectfully suggested, show proper respect by the New York State Court of Appeals for the decision of the Circuit Court of Appeals of the Ninth Circuit.

b. Importance of the issue.

The importance to millions of American citizens of the decision of the New York Court of Appeals in this case is irrefutable.

The New York Court of Appeals has held that the Airline may refuse to transport passengers "absent a showing of arbitrariness" unless "a carrier . . . uses the safety issue as a sham." The New York Court of Appeals

specifically held "We do not believe that Congress, in enacting the Federal Aviation Act, intended to test the Airlines discretion to deny passage to certain persons by standards of negligence," i.e. reasonable care.

As a practical matter, the standard set by the New York State Court of Appeals jeopardizes the right of every handicapped or disabled person to travel. Hannelore Adamsons was a person in a wheelchair. The only difference between her and thousands of other wheelchair confined persons was that she had a urine collecting bag strapped to her side. However, such a bag made her less of a problem than other wheelchair ridden people, since she would not have to get up during the flight to go to the bathroom. The flight from Haiti to New York was a mere three and one-half (3½) hours.

If the New York Court of Appeals' decision is allowed to stand, there is nothing to prevent airlines from refusing to carry any handicapped person on the ground that the safety of the flight would be affected. Certainly it would not be "arbitrary, capricious, or irrational" for an airline to take the position that handicapped people such as Hannelore Adamsons present some safety danger to the flight. Thus, the right of transport of every handicapped American will be called into question.

Nor can the power of the New York Court of Appeals be ignored. With New York being the second most populous state in the nation, with Kennedy and LaGuardia Airports in its jurisdiction; and with many airlines having their corporate offices in New York City, principles of Aviation Law enunciated by the New York Court of Appeals are likely to affect substantial numbers of travelers.

It is ironic, that at virtually the same time the Secretary of Transportation was forcing municipalities to provide access to public transportation for the disabled and handicapped, the New York State Court of Appeals was severely restricting the rights of these same people to travel by airplane.

Why should the airlines not be held to a standard of reasonable care? Why should the handicapped and disabled be relegated to second class citizenship in terms of air travel?

No one is suggesting that the airlines be held to a standard of hindsight. Both District Judge Smith in the *Cordero, supra,* case, and Justice Richard Wallach, the Trial Judge in this case, submitted the case to the jury on the basis of using reasonable care, based on the information which was or could have been available to the airline at the time the decision was made.

Specifically in this case, where the airline had 24 hours notice of plaintiff's condition, Justice Wallach charged the jury that the airline had a duty to use reasonable care in obtaining the information necessary to use its discretion. It was this charge that the New York Court of Appeals has held improper as a matter of law.

It is thus respectfully submitted that the criteria by which an airline may reject American citizens for travel is one of far-reaching national importance. At the present time, an airline in California must use reasonable care in determining whether to reject a passenger for safety reasons. On the other hand, an airline in New York State will not be liable, unless their actions were "arbitrary, capricious, or irrational" and "a carrier . . . uses the safety issue as a sham."

Surely, an issue such as this, which affects literally millions of American citizens is of sufficient importance to cause the writ to be granted.

Respectfully submitted,

ROBERT M. GINSBERG
JOSEPH S. LOBENTHAL, JR.
Attorneys for Petitioner

Opinion of the Court of Appeals, State of New York.

COURT OF APPEALS,

STATE OF NEW YORK.

1 No. 666

HANNELORE ADAMSONS,

Respondent,

v.

AMERICAN AIRLINES, Inc.,

Appellant.

(666) John M. Downing & Andrew J. Simons, NY City, for appellant.

Robert M. Ginsburg, NY City, for respondent.

JASEN, J.:

We are asked on this appeal to determine whether or not the defendant airline properly exercised its authority under the Federal Aviation Act in refusing to transport plaintiff, an invalid paralyzed from the waist down as a result of an undiagnosed illness, on the flight in question.

In January 1972, plaintiff was stricken with an undiagnosed illness while residing in Haiti. Her affliction

first manifested itself on January 21 and during the next ten days plaintiff suffered chest pains, weakened legs and incontinence. She consulted a number of local physicians who took X-rays and performed a variety of blood tests and neurological examinations, all of which proved inconclusive. Finally, after becoming totally paralyzed from the waist down, plaintiff was advised to seek medical attention in the United States.

One of plaintiff's friends, Mrs. Thelma Hamaty, made arrangements with defendant American Airlines on January 31 for plaintiff to fly to New York City the following day. Mrs. Hamaty informed one of defendant's agents, Mr. Bayard, that plaintiff was paralyzed and in need of a wheelchair. Mrs. Hamaty further explained that plaintiff could sit up and that her condition was not contagious. Thereupon, a first-class ticket was issued in plaintiff's name.

On February 1, plaintiff arrived at the Port-au-Prince airport in an ambulance approximately 45 minutes before her flight was scheduled to depart. As the ambulance attendants and defendant's employees were transferring plaintiff to a boarding wheelchair, she repeatedly cried out in pain. After being strapped into the wheelchair, plaintiff was wheeled toward the airplane. Throughout this process, she was crying, sobbing and obviously experiencing extreme discomfort. Defendant's personnel then noticed, for the first time, that plaintiff had a catheter and a Foley disposal bag attached to her body. At that point, it was decided by the airline that plaintiff's health and the safety of the other passengers would be jeopardized if plaintiff was allowed to travel on that flight. Consequently, plaintiff was denied passage.

As the airplane taxied towards the runway in preparation for takeoff, Mrs. Hamaty, for the first time, offered to accompany plaintiff on the flight. The offer was refused

for the same reasons plaintiff was denied permission to board.

Plaintiff flew to New York City on Pan American Airlines two days later. She was admitted to Columbia Presbyterian Hospital on February 3, 1972, where doctors diagnosed an intermedulla hematoma on her spinal cord. The surgery performed on February 4, 1972 was unsuccessful and plaintiff remains paralyzed from the waist down.

Thereafter, this action for money damages was commenced wherein it was alleged that defendant was negligent in refusing to accept plaintiff for passage and that the two-day delay in transporting her to New York proximately caused her permanent paralysis. After a trial before a jury, defendant moved for a directed verdict claiming, *inter alia,* that defendant's decision to deny passage to plaintiff should not be evaluated by a negligence standard. The motion was denied and the action was submitted to the jury to decide whether the defendant was negligent in refusing plaintiff passage to New York.

The jury returned a verdict of $525,000, which was reduced by the trial court to $500,000, the amount of the *ad damnum.* On appeal, the Appellate Division affirmed, with one justice dissenting.

The question before us is whether the airline, in refusing passage to the plaintiff in Haiti, properly exercised its authority of refusal under the Federal Aviation Act. We hold that it did.

Section 1111 of the Federal Aviation Act (49 USC §1511) was enacted by Congress in 1961 authorizing an air carrier to deny passage to any person "when in the opinion of the carrier, such transportation would or might be inimical to

safety of flight."[1] While it was originally enacted to help combat the serious problem of air piracy (1 U S Code Cong. & Ad. News, 87th Cong., 1st Sess., pp 520-522 [1961]; 2 U S Code Cong. & Ad. News, 87th Cong., 1st Sess., pp 2563-2582 [1961]),the statute has not been so restrictively applied. (See *Angel v. Pan American World Airways, Inc.*, 519 F Supp 1173 [refusing passage to handicapped child]; *Williams v. Trans World Airlines*, 509 F2d 942 [refusing passage to wanted criminal]; *Cordero v. CIA Mexicana De Aviacion, S.A.*, 681 F2d 669 [refusing to allow unruly passenger to reboard].)

---

[1]Section 1511, in full, provides:

"(a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport

> (1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or
>
> (2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given."

In implementation of section 1511, defendant filed with the Civil Aeronautics Board its International Passenger Rules Tariff No. PR-2, which, *inter alia,* allows defendant to "refuse to carry, cancel the reserved space of, or remove enroute any passenger" when the passenger's physical condition is such as to require special assistance or poses a hazard to himself or others.[2] It is conceded that this tariff has the force of law.

---

[2]Tariff No. PR-2 provides in pertinent part:

"LIMITATIONS OF CARRIAGE.

(A) *Refusal, Cancellations or Removal.*

(1) Carrier will refuse to carry, cancel the reserved space of, or remove enroute any passenger when:

(a) such action is necessary for reasons of safety;

(b) such action is necessary to prevent violation of any applicable laws, regulations, or orders of any state or country to be flown from, into or over;

(c) the conduct, age or mental or physical condition of the passenger is such as to

(i) require special assistance of carrier; or

(ii) cause discomfort or make himself objectionable to other passengers; or

(iii) involve any hazard or risk to himself or to other persons or to property.

(d) Passengers and their baggage are subject to inspection with an electronic detector with or without the passenger's consent or knowledge.

(2) If question arises of any aircraft's being overloaded, Carrier shall decide which passengers or articles will be carried.

A reading of section 1511 and the Tariff filed by the airline makes it abundantly clear that the decision to accept or refuse a passenger for air carriage lies exclusively with the airline. The law endows the airline with discretion in accepting or rejecting a passenger, based upon considerations of safety and problems inherent to air travel, and that such discretion, if exercised in good faith and for a rational reason, must be accepted. This is understandable when one considers that an airline usually must make such decisions on the spur of the moment, shortly before take-off, without the benefit of complete and accurate information. There are times when legitimate safety reasons require that the decision be based entirely on a prospective passenger's appearance and behavior. (See *Austin v. Delta Airlines, Inc.*, 246 So 2d 894.) Likewise, where in its judgment a sick or invalid person will require extraordinary individual care due to his or her condition, so as to interfere with the airline's duty to other passengers, the airline may refuse passage to that individual.

We do not believe that Congress, in enacting the Federal Aviation Act, intended to test the airline's discretion to deny passage to certain persons by standards of negligence. "[A]irline safety is too important to permit a safety judgment made by the carrier * * * to be second guessed months later in the calm of the courtroom by a judge or a jury, having no responsibility for the physical safety of anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the judgment was made." (*Cordero v. CIA Mexicana De Aviacion, S.A.*, 512 F Supp 205, 206-207, affd 681 F2d 669, *supra*.)

We hold, therefore, that the trial court erred in submitting to the jury the question of whether the airline acted negligently in refusing to allow plaintiff to board. The

determination whether to carry a sick or invalid person lies within the discretion of the carrier, and the standard which should be applied in reviewing the discretion exercised by the carrier, under the facts and circumstances known by the carrier at the time the decision was made, is whether the decision was arbitrary, capricious or irrational, constituting an abuse of the discretion vested by law in the carrier. (See *Williams v. Trans World Airlines,* 509 F2d 942, 948; see also Note, 40 J. Air L. & Com. 767, 776 [1974].)

Applying this standard to the facts of this case, we hold that, as a matter of law, defendant did not abuse its discretion in refusing to transport plaintiff to New York. As Justice Silverman correctly stated in his dissent, "[h]ere the airline saw the passenger for the first time three-quarters of an hour before departure time, and then for the first time could see concretly how ill the passenger was. It was obvious that the proposed passenger was very sick. The illness was undiagnosed; the possibility of infectious origin had not been ruled out; her legs were paralyzed; she was brought to the airfield in an ambulance on a stretcher and taken from the stretcher to a wheelchair. She obviously experienced great pain and suffering in the very act of being transferred and placed in the wheelchair and of sitting in the wheelchair. She had a catheter in her attached to a Foley * * * disposal bag. No special preparations, other than the wheelchair—nor any modification of seats—had been made or requested to accommodate her. There was no way of knowing what assistance she might need in the course of the proposed three hour flight, much of it over ocean. She was travelling alone. Only after the plane had started to taxi on the runway did the friend who was with plaintiff at the airport suggest that she would be willing to accompany the plaintiff to New York." Consequently, based upon plaintiff's condition as it appeared to

the airline on February 1, we do not believe that defendant abused its discretion in refusing to transport plaintiff to New York City at that time.[3]

Additionally, plaintiff argues that, apart from the airline's discretion to refuse to transport her to New York, defendant was negligent in failing to obtain information necessary to make that decision. We disagree.

As discussed earlier, the decision to refuse to transport a prospective passenger often must be made on the spur of the moment. It would, therefore, be imposing an impossible burden on an airline to require that it make a thorough investigation into the nature and extent of a person's illness before reaching that decision. To adopt such a rule would effectively curtail or eliminate the discretion vested by Congress in the airlines to refuse passage to persons whose presence, in the opinion of the airline, would be inimical to the safety of the flight. We believe that Congress intended airlines to have broad but not unlimited discretion to make such decisions. (See *Williams v. Trans World Airlines,* 509 F2d 942, 948, *supra.*) Absent a showing of arbitrariness, plaintiff's argument that defendant was negligent in failing to obtain information necessary to make its decision is unpersuasive. In this case, there was no showing of arbitrariness as a matter of law.

We emphasize that our decision today does not authorize air carriers to unjustly discriminate against sick, elderly or handicapped persons. The carrier's decision to refuse passage to any person must be premised on a valid concern for the safety of the flight and the individuals on that flight. A carrier who uses the safety issue as a sham in order to accomplish another purpose will not be insulated

---

[3]Under its International Passenger Rules Tariff No. PR-2 (*supra*) defendant has the authority to cancel a passenger's reserved space, as well as to refuse to issue a ticket in the first place.

from liability. (*Cordero v. CIA Mexicana De Aviacion, S.A.*, 512 F Supp 205, 207, affd 681 F2d 669, *supra*.) Congress expressly prohibited such conduct when it enacted section 404(b) of the Federal Aviation Act (49 USC §1374[b]).[4]

Accordingly, the order of the Appellate Division should be reversed and the complaint dismissed.

* * *

Order reversed, with costs, and the complaint dismissed. Opinion by Judge Jasen in which Chief Judge Cooke and Judges Gabrielli, Jones and Meyer concur. Judge Wachtler concurs in result for reasons stated in the dissenting memorandum of Justice Samuel J. Silverman at the Appellate Division (87 A D 2d 785-786). Judge Fuchsberg took no part.

Decided December 15, 1982

---

[4]Section 1374(b) provides that:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Since plaintiff does not rely on section 1374(b), we do not reach the question whether defendant unjustly discriminated against plaintiff.

U. S. District Court Opinion in *Victor Cordero v. CIA Mexicana De Aviacion, S.A.*, A Corporation, Also Known as Mexicana Airlines.

United States District Court for the Central District of California, April 20, 1981.

AIR CARRIERS—DISCRIMINATION—REFUSAL TO BOARD PASSENGER—FLIGHT SAFETY.—An air carrier did not violate the prohibition against unjust discrimination when it refused to board a passenger for the second segment of a flight after a commotion arose because of a delay in the first segment of the flight. An air carrier may refuse transportation to a person when, in the opinion of the carrier, such transportation would or might be inimical to safety in flight. A safety judgment made by a carrier should not be second-guessed months later in the calm of a courtroom by a judge and jury, where there is no suggestion of ill will, no suggestion that the action taken was because of age, sex, race, or creed, and no basis for holding that the safety issue was a sham.

Back reference: ¶ 16,225.40; 17,328.75.

Henry Seligsohn, King & Seligsohn, Los Angeles, California, for plaintiff.

Michael J. Holland, Condon & Forsyth, Los Angeles, California, for defendant.

Before Smith, D.J.

The plaintiff booked passage on defendant's direct flight No. 905 on May 27, 1979, from Los Angeles to Mexico City. After departure the flight was diverted to Mazatlan to pick up people who had been stranded there,

and the through passengers were required to disembark and go through Mexican immigration. Plaintiff was not permitted to reboard and brings this action for actual and punitive damages. The issues were submitted to the jury, which decided them in favor of the plaintiff and awarded damages as follows:

General damages (apart from baggage)	$1,000.00
Punitive damages	35,000.00
Loss of or damage to baggage	1,000.00

Motions for a directed verdict were made at the close of plaintiff's case and at the close of all of the evidence, both of which were denied. The court now grants judgment notwithstanding the verdict as to general and punitive damages.

Flight 905 was late out of Los Angeles. In flight, irritation at the delay was expressed by the passengers. Alcoholic drinks were served to the passengers, including plaintiff, who had also imbibed at the lounge in Los Angeles while awaiting the flight. When it was announced that Flight 905 would be diverted to Mazatlan, the irritation increased, and one passenger, identified as "Garcia," became extremely vocal and called the pilot a vulgar name. The situation appeared to the stewardess to be serious enough to require the presence of the pilot, who came out of the cockpit to talk to the unruly passenger. Later the stewardess announced that the passengers would be required to disembark. Again there was a commotion among the passengers. The passengers did disembark.[1]

[1]The stewardess and the pilot testified that, as the plaintiff passed the stewardess at the exit of the plane during disembarkation, the plaintiff made an obscene statement and a gesture to the stewardess. The plaintiff denied this, and the jury by its verdict must have accepted the plaintiff's version. The alleged incident is not considered in reaching the court's conclusion.

There was loud talk and pounding of the counter in the immigration waiting room. Plaintiff was a leader in securing some 25 signatures to a complaint to be addressed to the airlines. The decision to exclude plaintiff was made without regard to these events, but they do indicate something with regard to the passenger irritation. The plaintiff testified that he believed that Garcia was the real culprit and that the pilot had made a mistake in identity.

49 U.S.C. §1374(b) forbids an air carrier from making unjust discriminations, and a carrier may be liable to a party who has been the victim of an unjust discrimination. Such discrimination has been found where a denial of passage was based on race,[2] or where the carrier has failed to follow its own rules for boarding passengers in cases of oversale.[3] Under 49 U.S.C. §1511(a), an air carrier may refuse transportation to a person "when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." A carrier which properly refuses transportation under this section does not discriminate in violation of 49 U.S.C. §1374(b).[4] The words "in the opinion of the carrier" were not qualified by Congress, and the question now arises whether the court should qualify the section so that only reasonable or rational opinions justify the right to exclude. If so, then a finder of fact must in the afterlight determine what was reasonable or rational. I think we should not reach this result. I think that airline safety is too important to permit a safety judgment made by the carrier (in this case the pilot) to be second-guessed months later in the calm of a courtroom by a judge or a jury, having no responsibility for the physical safety of

---

[2] *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956).

[3] *Smith v. Piedmont Aviation, Inc.*, 567 F.2d 290 (5th Cir. 1978).

[4] *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975).

anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the judgment was made.

Certainly an air carrier may not use flight safety as an excuse to discriminate among passengers, and where the safety issue is a mere sham used to hide some other purpose, the finder of fact should be permitted to find a discrimination. But where, as here, there is no suggestion of any ill will to plaintiff on the part of the airline or its employees, and no suggestion that the action taken was because of age, sex, race, or creed of the plaintiff, and where, as here, there was a real, live incident of concern to the pilot, there is no basis for holding that the safety issue was sham. There may have been an overreaction coupled with mistaken identity. In my opinion, that is not discrimination warranting relief under 49 U.S.C. §1374(b).

What has been said is, of course, applicable to the problem of punitive damages; but even if plaintiff is entitled to compensatory damages, there is simply nothing in the record which directly or indirectly would justify a finding of evil motive, malice, deliberate violence, or oppression. See *Smith v. Piedmont Aviation, Inc.*, 567 F.2d 290 (5th Cir. 1978).

The clerk is directed to enter judgment in favor of the plaintiff in the amount of $1,000.00.

U. S. Court of Appeals, Ninth Circuit, Opinion in *Victor J. Cordero v. Cia Mexicana De Aviacion, S.A.*

United States Court of Appeals, Ninth Circuit,
No. 81-5400, July 16, 1982.

(For prior action in the U.S. District Court for the Central District of California, see 16 Avi. 17,633.)

AIR CARRIERS—DISCRIMINATION—REFUSAL TO BOARD PASSENGER—FLIGHT SAFETY.—There was ample evidence for a jury to conclude that an air carrier acted unreasonably in excluding a passenger from the second segment of a flight, after a commotion arose because of a delay in the first segment of a flight. However, punitive damages were not proper because there was no evidence of wanton, oppressive or malicious conduct on the part of the carrier.

Back references: ¶16,225.40; 17,328.75.

Before Wallace, Schroeder and Canby, Circuit Judges.

CANBY, Circuit Judge: Victor Cordero appeals from the district court's entry of judgment notwithstanding the verdict in a case brought against Mexicana Airlines for wrongful exclusion from a Mexicana flight. The jury found for Cordero and awarded him $1000 for loss of baggage, $1000 in general damages, and $35,000 in punitive damages. The district court, 512 F.Supp. 205, granted Mexicana's motion for judgment notwithstanding the verdict on the general and punitive damages awards. We reverse the judgment denying general damages and reinstate the jury award. We affirm the judgment denying

punitive damages, however, since the evidence adduced at trial does not support such an award.

FACTS

Cordero boarded a regularly scheduled non-stop Mexicana flight from Los Angeles to Mexico City. There was a long delay on the ground in Los Angeles and, once en route, the pilot announced an unscheduled stop in Mazatlan to pick up additional passengers. Several passengers, disgruntled about the delay in Los Angeles, became visibly upset upon learning of the impending stop in Mazatlan. One passenger, sitting near Cordero, became loud and directed insults at the pilot. The pilot came out of the cockpit and warned the passenger that if he didn't control himself, he would be ejected at Mazatlan. Other than various discontented mutterings, there were no other incidents prior to landing. Inside the terminal at Mazatlan, Cordero circulated a petition complaining of the stop. When he sought to reboard the plane, airline ground personnel informed Cordero that he would not be allowed to continue the flight because he had insulted the captain and the crew. Cordero protested his innocence and informed ground personnel that they had ejected the wrong person. Mexicana refused to reconsider its decision and reissued Cordero's ticket for the following day.

Cordero then brought this action claiming unjust discrimination in violation of section 404(b) of the Federal Aviation Act of 1958, (Act), as amended, 49 U.S.C.

§ 1374(b) (1976).[1] At trial, the head stewardess testified that upon disembarking at Mazatlan, Cordero had uttered an obscenity and had raised his arm as if to strike her. She further testified that she had reported the incident to the pilot who decided to exclude Cordero from the continuing flight, Cordero claimed that he was the victim of mistaken identity and produced the testimony of another passenger who confirmed that Cordero had made no untoward remarks or gestures to the stewardess.

The district court instructed the jury that denial of passage was not a violation of the Act if, at the time it refused passage, the airline held a reasonable belief that Cordero might have endangered the continuing flight.[2]

---

[1]Section 404(b) of the Act, 49 U.S.C. §1374(b) provides:

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is well settled that a private right of action exists under this section for a passenger who is "bumped" as a result of overbooking. *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972). *Accord, Karp v. North Central Airlines, Inc.*, 583 F.2d 364 (7th Cir. 1978); *Smith v. Piedmont Aviation, Inc.*, 567 F.2d 290 (5th Cir. 1978); *Nader v. Allegheny Airlines*, 512 F.2d 527 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976). Similarly a private right of action exists for racial discrimination. *E.g., Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956). We see no material distinction between these situations and the present one, for purposes of an implied right of action.

[2]The district court instructed the jury in the following language:

An airline is justified in refusing to transport a passenger if that transportation in the opinion of the airline and, that again, means the pilot, would be inimical to the safety of the flight. In other words, in

(Continued on following page)

After the jury found for Cordero, the district court, relying on section 1111(a) of the Act, 49 U.S.C. § 1511(a), granted judgment notwithstanding the verdict. Under section 1511(a), an air carrier is permitted to refuse transportation to a person "when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight." Contrary to his previously issued jury instructions, the district judge held that section 1511(a) does not require the air carrier's belief that a passenger might create a safety hazard to be a reasonable one in order for the carrier to exclude that passenger from a flight. The judge also found the evidence insufficient to support an award of punitive damages. For the reasons set forth below, we reverse in part and affirm in part.

ANALYSIS

Although section 1511(a) empowers an air carrier to refuse passage, we do not think that it renders immune from liability a carrier whose decision to deny passage is unreasonably or irrationally formed. While we agree with the district court that air safety is a paramount concern of air carriers and of the public generally, we do not believe that requiring *carriers to act reasonably in formulating opinions* to deny passage undercuts this concern. We note that the Second Circuit in *Williams v. Trans World*

(Footnote continued)
judging the legality of a denial of passage, we look to the opinion of the airline pilot, and that opinion controls, if it's a reasonable opinion based on the facts and circumstances as they appear to the pilot at the time that the decision was made. It is not what is reasonable in the after-light, but what appears to be reasonable at the time. On the other hand, if the passenger is excluded because the opinion of the pilot is arbitrary or capricious and not justified by any reason or rational appraisal of the facts, then the denial of passage is discriminatory.

Airlines, 509 F.2d 942 (2d Cir. 1975), has come to a similar conclusion. In *Williams,* Trans World Airlines invoked section 1511(a) to justify a denial of passage on the basis of F. B. I. reports to the airline that the ticket-holder was a diagnosed schizophrenic and should be considered armed and dangerous. Although the airline found no weapons on the ticket-holder, Williams, it nevertheless refused passage on a flight from London to Detroit. The court of appeals, affirmed a finding of no unjust discrimination, holding that the airline had a right to accept the F. B. I. reports at face value. 509 F.2d at 948-49. In reaching this conclusion, the court found that section 1374(b) does not limit a carrier's discretion to refuse passage under section 1511(a) so long as the carrier acts on evidence which "would cause a reasonably careful and prudent air carrier of passengers to form the opinion that the presence aboard a plane of the passenger-applicant 'would or might be inimical to safety of flight.' " *Id.* at 948. To aid the trier of fact in determining whether the carrier acted reasonably under section 1511(a), the court set forth the following test:

> The test of whether or not the airline properly exercised its power under § 1511 to refuse passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight. *Id.*

We believe there are persuasive reasons for adopting the *Williams* test. First, a requirement of reasonableness under section 1511(a) is consistent with section 1374(b),

which was enacted for the benefit and protection of persons using the facilities of air carriers. *E.g., Caceres Agency Inc. v. Trans World Airways, Inc.,* 594 F.2d 932, 933 (2d Cir. 1979). We have not found, nor have we been shown, any legislative history indicating that in enacting section 1511(a) Congress intended to limit the protections afforded ticket-holders under section 1374(b). Second, the *Williams* test takes into account the fact that air carriers often must make decisions within moments of take-off and with less than perfect knowledge. The reasonableness of the carrier's opinion, therefore, is to be tested on the information available to the airline at the moment a decision is required. There is correspondingly no duty to conduct an indepth investigation into a ticket-holder's potentially dangerous proclivities. We believe this facet of the test provides a reasonable balance between safety concerns and the right of a ticket-holder to be free from unwarranted discrimination.[3]

Because the district court properly instructed the jury in the precise language of the *Williams* test[4] and because it is peculiarly within the province of the trier of fact to determine whether the defendant's conduct was reasonable, we reverse the judgment on the general damages award and reinstate the jury verdict. A motion for judgment notwithstanding the verdict should not be granted unless the evidence, viewed in the light most favorable to the prevailing party, permits only one reasonable conclusion. *Flores*

---

[3]We further note that a requirement of reasonableness under §1511(a) is consistent with the common law rule that "where a carrier has reasonable cause to believe and does believe, that the safety or convenience of its passengers will be endangered by a person who presents himself for transportation, it may refuse to accept such person for transportation and is not bound to wait until events have justified its belief." 14 Am.Jur.2d, Carriers, §865 at 309, *cited in Williams, supra,* 509 F.2d at 948 n.10.

[4]See note 2 *supra.*

v. Pierce, 617 F.2d 1386, 1389 (9th Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980); *Kay v. Cessna Aircraft Co.,* 548 F.2d 1370, 1372 (9th Cir. 1977). There is ample evidence in the trial record from which the jury might have concluded that Mexicana acted unreasonably in excluding Cordero without even the most cursory inquiry into the complaint against him.

We affirm the judgment denying punitive damages, however. We need not decide the validity of Mexicana's contention that punitive damages are never awardable when a passenger is refused passage on grounds of safety. For if punitive damages are permissible, they can only be awarded where the defendant has acted "wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligation." *Archibald v. Pan American Airways, Inc.,* 460 F.2d 14, 16 (9th Cir. 1972), quoting *Wills v. Trans World Airlines, Inc.,* 200 F.Supp. 360, 367-68 (S.D.Cal. 1961). Cordero's theory at trial was that he was the victim of mistaken identity. Assuming that the airline was negligent in failing to ascertain the true identity of the person who offended the stewardess, this conduct does not rise to the level necessary to support an award of punitive damages. After a careful review of the record, we are unable to locate any other evidence upon which the jury properly might have awarded punitive damages.

Reversed in part and Affirmed in part.

Order of the Court of Appeals, State of New York, on Motion for Reargument.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of February, A. D. 1983.

Present,

Hon. Lawrence H. Cooke, Chief Judge, presiding.

---

1 Mo. No. 74

HANNELORE ADAMSONS,

Respondent,

vs.

AMERICAN AIRLINES,

Appellant.

A motion for reargument &c. having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied. Judge Fuchsberg took no part.

JOSEPH W. BELLACOSA
Clerk of the Court